IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 114

WABASH CORPORATION and HARTFORD NATIONAL BANK & TRUST COMPANY (Trustee),
Petitioners,

v.

ROSS ELECTRIC CORPORATION and GENERAL ELECTRIC COMPANY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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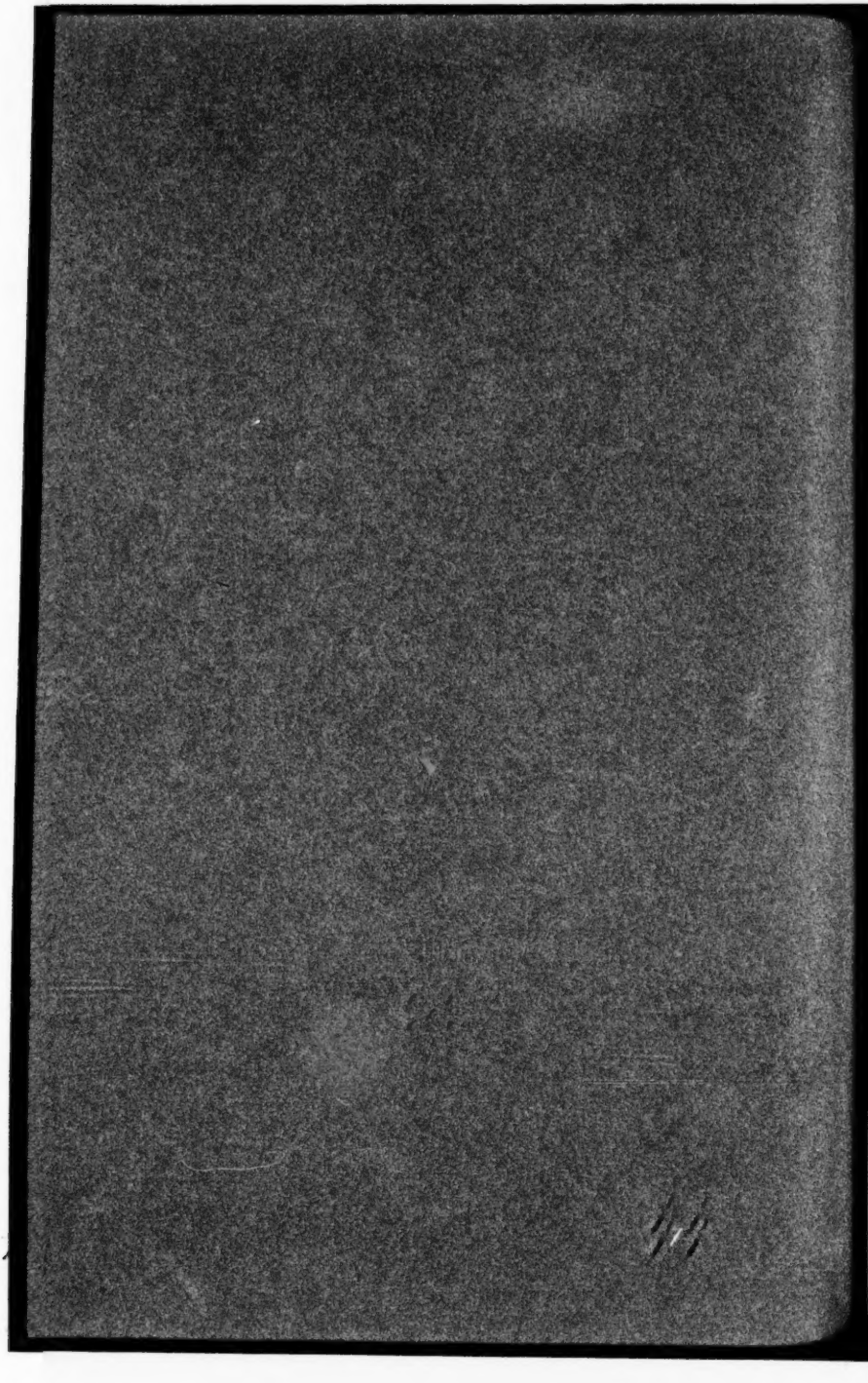

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This is an ordinary suit for alleged patent infringement, in which the Court of Appeals for the Second Circuit held Korver patent No. 2,162,847 for a "Flash Lamp" to be invalid. The opinion of the Court of Appeals is at R.* 215 to 274 and is reported at 187 F. 2d 577. The opinion of the District Court, which held the patent valid, is at R. 6 to 30, and is reported at 81 F. Supp. 511.

Plaintiff, Hartford, holds legal title to the patent in suit, as assignee in trust of N. V. Philips Gloeilampenfabrieken, Eindhoven, Holland, the leading European

* The testimony was printed before the Court of Appeals in a "Joint Appendix", to which the proceedings in that Court have now been added. This volume is referred to in this brief as "R. ——." The exhibits are before this Court as physical exhibits, and some are reproduced in a "Joint Exhibit Book."

manufacturer of all types of lamps and the employer and assignee of Korver, the patentee. Plaintiff, Wabash, the flash lamp manufacturing subsidiary of Sylvania Electric Products, is exclusive licensee under the various Philips flash lamp patents in this country. Defendant, General Electric, manufactures and sells the alleged infringing shredded foil flash lamps; defendant, Ross, sells such lamps in the Eastern District of New York.

The only question involved in the petition is whether the action of the Court of Appeals in holding the Korver flash lamp patent to be invalid should be reviewed by this Court.*

The petition does not involve the Korver method patent No. 2,115,423, held not infringed by all of the judges below, nor does it involve any question concerning the District Court's procedure as to that patent, discussed at length by the Court of Appeals (Petition, p. 3).

The holding of invalidity with respect to the product patent, which is sought to be reviewed, does not present any unsettled or disputed question of law. There is no conflict in decision with any other circuit. The case presents no question of general interest or public importance, and there is no reason why this Court should grant certiorari. Furthermore, the decision below that the patent is invalid is entirely correct.

1. There is no reason why the writ should be granted

In substance, the only reason advanced in the petition as to why a writ should be granted in this case is the contention that the Court below required a standard of inven-

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* The Court of Appeals, having held the patent invalid, did not pass on the defense of non-infringement. Actually, the patent is not only invalid but also is not infringed by the respondents' products, which differ substantially from the product disclosed and claimed in the patent in suit in respects which are of the essence of the claimed invention.

tion which was too high. As to this contention, the petition states:

> "If it be true that Judge Hand or Judge Frank concluded therefrom [the recent decision in the *Supermarket* case, 340 U. S. 147] that patents are now to be sustained only in rare cases of outstanding invention, we submit the Court below misapprehended that decision and decided the question at bar in a way that is in conflict with applicable decisions of this Court." (Petition, pp. 9-10)

The difficulty with this argument and, in fact, with the whole petition, is that it poses a question which is in no way presented by the actual facts of the present case. Judge Hand made no reference to the *Supermarket* case or to any supposed change in the standard of invention required for patentability. He simply held that he and Judge Frank were "unable to discover any patentable invention" (R. 216) in the patent, in view of what the prior art taught. This holding was abundantly justified by the facts of the case.* As stated by Judge Hand, with the concurrence of Judge Frank,

> "The Ostermeier, Van Liempt and Crowley patents taught the art enough to defeat the claims of the product patent relied on. In the first, a metallic foil was used; in the second, a metallic wire; and in the third, metallic wool. The only thing that remained was to fill the entire bulb with the wire for, given that, the filling would normally be undulating, serpentine, and elastic." (R. 216)

In quoting from Judge Hand's opinion, petitioners omit a very significant portion, a portion which goes far to explain why Judge Hand properly held that the Korver

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* The pertinent facts as to what was old before Korver's alleged invention are documentary or stipulated. The dissenting opinion, and the District Court's opinion, simply failed to appreciate the significance of some of these undisputed facts and thus attributed to Korver things which he did not actually contribute.

product patent was invalid under any "standard of invention" which has ever been applied by the courts. As Judge Hand stated in his opinion, immediately following the portion quoted by the petitioners:

> "If there was any invention in either of the patents in suit, it was in the mode of blowing the wire into the bulb with a stream of controlled air."

This particular method and device for filling a bulb was the thing originally stressed in Korver's patent application and the thing with which substantially his entire patent description and drawings are concerned. All of the judges below agreed that General Electric did not use this method of filling a bulb, which was Korver's true contribution, if any, and petitioners do not here attack this unanimous holding.

The product patent which is here involved issued as a division of Korver's original application, which was entitled "Method and Device for Transporting Wires." The "divisional" patent, entitled "Flash Lamp," which is the patent before this Court, is in fact a patent solicitor's invention, a thing of words with little connection to Korver's actual contribution.* Even as to this flash lamp patent, which a patent solicitor's persistence finally obtained from the Patent Office, plaintiffs have had to construe the patent so broadly, in order to make the patent read on the accused General Electric shredded foil lamp, that the patent would cover any flash lamp uniformly filled with crumpled strand material.

This would make the patent read on flash lamps disclosed in prior patents, and the Court below correctly held the patent invalid, without any need to use, or to discuss, a "high standard of invention."

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* Korver tried, but was unable to secure, any claims to the lamp in Germany where he filed his original application on which both of his United States patents were based.

2. The decision below was correct in holding the Korver product patent invalid

The patent here involved, Korver product patent No. 2,162,847, is for a particular kind of flash lamp used in photography, such lamps usually being called "photoflash" lamps. The earliest date claimed for Korver is May, 1934, the filing date of his German application.

(a) The patent in suit compared to the prior General Electric foil filled lamp

The first successful photoflash lamps were those produced under Ostermeier Patent No. 1,776,637 (Exhibit Book, p. 11). These Ostermeier lamps were put on the market in the United States by General Electric in 1930, four years before any activity by Korver.

These Ostermeier photoflash lamps consisted of a sealed lamp bulb containing oxygen gas and a loose filling of thin crumpled aluminum foil uniformly distributed throughout the bulb. When such a lamp (whether the combustible filling be of sheet foil, strips of foil, or wire) is connected to a source of electricity, a small filament in the lamp flashes its coating of a fulminating substance, igniting the metallic element and oxygen, thus producing a flash of the high intensity and short duration suitable for use in flash photography (Stipulation, Exhibit Book, p. 6).

The Korver patent (Exhibit Book, p. 7) shows a method and device whereby a long, continuous, thin alloy wire is internally strained and blown into a lamp bulb under tension in such a manner that when the wire is released in the bulb it assumes an undulated, coiled position, elastically pressed against the bulb walls. The claims call for a flash lamp containing "a mass of thin undulated wire," "elastically supported from the wall thereof," and "in substantially uniform spacial distribution."

(b) The flash lamp of the Korver patent and the accused shredded foil lamps are alike only in having their combustible material in strand form, and distributed throughout the bulb

The General Electric shredded foil photoflash lamps, which are the alleged infringement involved here, have, instead of Korver's undulated wire, a filling "consisting of a mass of crumpled shreds or narrow strips cut from a sheet of aluminum foil" (Stipulation, Exhibit Book, p. 1). This filling material, when examined under the microscope, is seen to have a highly irregular cross-sectional shape with burrs at the edges,* as seen in Figure 3 of the Rippl et al. patent at page 23 of the Exhibit Book.

Hundreds of such strips are used per lamp instead of one continuous wire, as in Korver; the material is pure aluminum, instead of the magnesium-aluminum alloy used by Wabash; instead of being undulated or coiled like the Korver wire, the General Electric shreds "form into a tangled mass of crumpled shreds bent in every conceivable direction at non-uniform intervals" (Stipulation, Exhibit Book, p. 4). In spite of the natural resemblance between any very fine strands of metal, when viewed with the naked eye, the difference between the Wabash coiled or undulated wire and the General Electric crumpled shreds can be seen quite clearly by comparing the enlarged photographs, defendants' exhibits P and Q (Exhibit Book, pp. 50 and 51). The regular coiling or "undulations" in the Wabash lamp shown in Exhibit Q is in striking contrast to the haphazard "hay" of the General Electric shreds, shown in Exhibit P.

Instead of being elastically pressed against the bulb like Korver's coiled spring-like wire, the shreds of foil are merely in contact with the bulb wall and do not bear elastically against it, as shown by comparing the photo-

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* This has the advantage of being easier to ignite than wire (R. 124). It is significant as to the existence of a real difference and advantage, that Wabash has itself now gone over to the use of shredded foil instead of wire (R. 66).

graphs at pages 52 and 53 of the Exhibit Book. The General Electric shreds are held in position in the finished lamp by being embedded in the lacquer coating on the inside of the bulb wall before the lacquer hardens (R. 129).

The substance of the matter is that Korver differed from the original General Electric Ostermeier foil lamp in using a filling of undulated magnesium-aluminum alloy wire instead of sheets of aluminum foil. The accused General Electric shredded foil lamps differ from the original General Electric Ostermeier lamp in using thin shreds or strips cut from thicker aluminum foil, instead of Ostermeier's thinner sheets. In so far as the Korver patented lamp and the accused General Electric lamp differ from the original Ostermeier lamp, they have diverged in different directions, and are alike only in using strand material instead of sheet material as the combustible filler.

(c) Korver was not the first inventor of a flash lamp using strand material as the combustible filling

Korver was not the first to suggest the use of strand material instead of sheet foil in a flash lamp, nor indeed was he the first to suggest the use of wire. The exact wire used by him and by Wabash in all of its wire filled lamps was invented prior to Korver by Van Liempt, another patentee.

At various times after the commercial introduction of flash lamps by General Electric in the form of its sheet foil lamp, the suggestion had been made that the combustible material in flash lamps be in the form of wire, strip, ribbon, and metallic wool, instead of foil, as we shall see in our discussion of the prior patents. If the combustible material could be made in such form, it could be thicker but still ignitable and thus a longer flash would be produced, and other advantages obtained. The trouble was that no practical way was then known of producing such materials of the thinness required for ignition, aside from the beaten foil then used in the General Electric lamps (R. 116, Exhibit Book, p. 45, col. 1, l. 40 to col. 2, l. 4).

This problem was solved in different ways: in one way by the Philips Company in Holland, which developed a new magnesium-aluminum alloy wire, and in a different way by General Electric, which developed new machines capable of cutting extremely thin strips from a sheet of aluminum sheet foil. Korver had nothing to do with either of these different and independent developments.

The first solution, in point of time, was by Van Liempt, a fellow-employee with Korver of the Philips Company. In April, 1934, just prior to Korver's application, Van Liempt filed his application which resulted in Patent No. 2,037,101, found at page 45 of the Exhibit Book. This patent describes the advantages of using wire instead of foil,* but points out (p. 1, col. 1, l. 53, to col. 2, l. 1) that:

> "To obtain aluminium wire which can be ignited it would be necessary to draw aluminium far below the diameter to which it has been practical to draw it * * *."

It then goes on to state that Van Liempt has discovered that certain magnesium-aluminum alloys, for example an alloy having 5% magnesium and 95% aluminum, can be, unlike pure aluminum, conveniently drawn cold into wire which is fine enough so as to be readily inflammable in a flash lamp (p. 1, col. 2, l. 53, to p. 2, col. 1, l. 2).

It was Van Liempt's discovery of this alloy wire which made possible the production of the Philips and Wabash lamps, and the Van Liempt magnesium-aluminum alloy has been used by Wabash in all of its wire filled lamps (R. 57).

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* The beaten foil, extremely thin so as to be ignitable, was difficult to handle, "requires careful manual operations" and its "relatively high price" made the lamps fairly expensive (Patent, p. 1, col. 1, ll. 32-39). If wire is used, it can be thicker than foil (Patent, p. 2, col. 1, ll. 43-48), and thus slower burning, and "such lamps can be made in smaller bulbs" than foil lamps "for the same or even a greater amount of actinic radiation" (Patent, p. 2, col. 2, ll. 52-55).

Thus it was another employee of the Philips Company, *not Korver,* who first developed a wire which could be used for flash lamps, and which was and is used by Wabash in all of its wire filled lamps. Van Liempt's patent shows that it was he, not Korver, who recognized that wire lamps would be cheaper, more uniform, smaller in size and capable of using thicker material (and therefore slower burning) than foil lamps. These were not discoveries of Korver's. Whatever advantages flow from the use of the wire form of combustible material in flash lamps redound to the credit of Van Liempt, and not to the Korver patent. Korver merely devised a machine to blow Van Liempt's wire, devised specifically for use in flash lamps, into the flash lamp bulb.

In finally securing the allowance of the Korver lamp claims over the Van Liempt patent, Korver's attorney relied upon the argument that Van Liempt's wire was wound into a clew (ball) supported in various ways by the stem, and was not shown as touching the bulb walls or substantially filling the "active portion" of the bulb (File wrapper, Def. Ex. I). This argument for distinguishing Korver from Van Liempt was based on the fact that the Van Liempt patent drawings show the combustible wire as not entirely filling the bulb or touching the bulb walls, as distinguished from being stuffed into the bulb in such a way as to occupy the entire space available. However, the Van Liempt patent indicates that if a sufficiently fine wire is used or if the bulb wall is lacquered to protect it, there is no need to keep the wire away from the bulb (Exhibit Book, p. 47, patent, p. 3, col. 2, ll. 7-17). The Wabash commercial wire filled lamps use the finer wire and the interior lacquer, just as Van Liempt suggested before Korver. Therefore they naturally have the Van Liempt wire distributed throughout the bulb, as was normal practice with combustible material in prior flash lamps.

(d) Korver was not first to have crumpled strand material uniformly distributed throughout the bulb

There was nothing new with Korver in having a lamp with the flash material distributed throughout the "active portion" of the bulb and supported by the bulb walls. This was the customary way of distributing the flash material in the bulb long prior to Korver.

The Ostermeier patent, referred to above, shows a lamp in which a filling of crumpled foil was distributed throughout the "active portion" of the bulb and was in contact with and supported by the bulb walls. The same is true of the lamps which General Electric manufactured commercially under that patent beginning in 1930, long before Korver's alleged invention (R. 104, 106-107; Standardizing Notice, Def. Ex. J).

Similar distribution throughout the bulb and support by the bulb walls is shown in the prior Nichols Patent No. 1,995,938 (Exhibit Book, p. 28), which states that wire can be used instead of foil, and the prior Kobayashi Patent No. 1,904,057 (Exhibit Book, p. 31), which says that the combustible material can be foil or metal ribbon.

Similarly, the prior Crowley British Patents Nos. 403,427 and 403,638 (Exhibit Book, pp. 33 and 40) show the use of metallic wool (a matted tangle of metallic strands), among other things, as a combustible material in a flash lamp, the drawings disclosing the material as uniformly distributed throughout the bulb (e.g., Exhibit Book, p. 43).

Nor do the references in the Korver claims to "elastic support" and "undulations" impart anything new or patentable. If the term "elastic support" is broad enough to include defendants' relatively inelastic shredded foil, it also includes the metallic wool of the prior Crowley patent. The Crowley bulb, filled with metallic wool, would have at least the same elastic support from the bulb wall as does the shredded foil lamp alleged to infringe Korver. Even the extremely thin foil of Ostermeier's original lamp

supported itself from the bulb walls, and if pressed down would return to place (R. 129).

As to "undulations", if the term "undulated wire" in the Korver patent were to be construed broadly enough to cover General Electric's crumpled shredded foil, then it would be completely anticipated by Crowley, because shredded foil is composed of thin strips of metal and is a form of metallic wool, both suggested earlier by Crowley for filling flash lamps.

Anything in common between the Korver lamp and the General Electric shredded foil lamps is found in the Crowley lamp filled with metallic wool. The Korver lamp patent cannot be valid over the prior art, including Crowley, and still be broad enough to cover the General Electric shredded foil lamps.

Furthermore, no claim of novelty for Korver can be based on the presence of undulations, because several patents, including Van Liempt, had suggested using wire filling before Korver, and the Korver patent admits at p. 1, col. 1, ll. 41-44, that:

> "As a rule, such thin wires inherently have sufficient internal strain to assume the desired curling upon entering the space, and to permanently retain such curling."

When Korver arrived upon the scene, others had already suggested wire as a flash material, and had disclosed the advantages that a wire lamp would have over a foil lamp. As soon as Van Liempt made available a wire which could be used as the combustible material in a flash lamp, the natural and obvious way to arrange such wire was just as Ostermeier had arranged his filling of foil, or Crowley his strips of metal or metallic wool, and this is just what Korver did; Korver merely loosely filled a bulb with Van Liempt's wire in accordance with the teachings of the prior art and let nature take its course.

There was no long search for Korver's alleged invention, which was obvious and followed immediately after Van Liempt's application disclosing his alloy wire.

The prior art shows that there was no invention in Korver's lamp, under any standard of invention. Indeed, if the claims are read broadly enough to cover the accused shredded foil lamps, they are directly anticipated by the Crowley lamp filled with metallic wool. The Court of Appeals was entirely correct in holding the patent invalid.

3. Commercial success of the Wabash lamp was not due to Korver

Much of plaintiffs' argument below and most of what they have to say in their petition here is based on the commercial success which the Wabash lamps had after their introduction on the market. The Wabash lamps were indeed successful, although the chart which petitioners reproduce in their petition gives an unfair picture of the situation, minimizing General Electric's sales during the period when it was selling three different types of lamps, by charting each of the different types separately. However, the important fact is that the commercial success of the Wabash lamp was due to factors in no way attributable to Korver.

When plaintiff Wabash entered the flash lamp field in 1936 (six years after General Electric had introduced flash lamps on a commercial basis), it did so as the exclusive American licensee of the well known Philips Company. This license included the Van Liempt patent which we have previously discussed, and another Van Liempt patent for a so-called "safety spot," together with two pending applications, of which the application for the Korver filling process was one (License, Plf. Ex. 1, Annex CC). The lamps which Wabash produced under this license and introduced under the name "Superflash" embodied the Van Liempt magnesium-aluminum "hydronalium" wire

which, as we have seen, first made possible the wire-filled lamp as a commercial product. These lamps had the longer burning period—a broader peak—which resulted from the use of thicker combustible material, and other advantages (such as the lack of shielding) which resulted from the use of wire instead of leaf foil. The principal points stressed in the effective Wabash advertising were the use of "patented hydronalium wire" of Van Liempt and Van Liempt's "patented safety spot" (Wabash advertisement, Def. Ex. C), neither of which had anything to do with the Korver patent in suit.

The Wabash lamp differed in almost all of its important specific features, such as the vital matters of oxygen pressure and primer material, from those suggested in the Korver patent (R. 60-62).

If credit were to be given to any new features other than Van Liempt's wire, it should be given to the use of higher oxygen pressure within the lamp, which permitted substantial reductions in the size of lamp required to produce the same illumination. This feature of higher pressure (and the resulting smaller size) was not contributed by Korver, who stressed the use of much lower pressures. Anderson, Wabash's chief engineer and plaintiffs' principal witness at the trial, testified that the increased pressure which began to be used sometime in 1938 was "quite an important development" (R. 62) and, Wabash, in seeking a patent on the use of such higher pressures, submitted Anderson's affidavit asserting that:

> "* * * the vast increase in sales of my assignee was primarily on account of the inventions covered by my [Anderson's] applications above identified." (R. 64)

Under the circumstances disclosed in the record, commercial success of the Wabash lamps furnishes no support whatever to the validity of the Korver product patent here involved.

Conclusion

In practical effect, in seeking to stretch the Korver patent to cover General Electric's shredded foil lamps, petitioners are contending that this patent gives them the right to exclude all others from making and selling flash lamps uniformly filled with crumpled strand material. The prior art shows that the Korver patent cannot be valid for any such scope, and the Court below correctly held it to be invalid.

This case does not present any unsettled questions of law or any questions of public importance. The opinion does not discuss the "standard of invention", and the patent involved is clearly invalid under even the lowest standard.

The petition for certiorari should be denied.

Respectfully submitted,

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